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No. 85-477 (3)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

PHILADELPHIA ELECTRIC COMPANY,
Petitioner

v.

HERCULES INCORPORATED,
Respondent

and

GOULD, INC.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Third Circuit

BRIEF OF HERCULES INCORPORATED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

John Gerald Gleeson, Esquire
Hercules Incorporated
Hercules Plaza
Wilmington, DE 19899
(302) 594-7004

Joseph G. Manta, Esquire
John C. Sullivan, Esquire
FRUMKIN & MANTA
Suite 1818
Three Penn Center Plaza
Philadelphia, PA 19102
(215) 988-0777
Attorneys for Respondent, Hercules Incorporated

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44 pp

QUESTIONS PRESENTED FOR REVIEW

1. Will this Court consider on a petition for writ of certiorari an issue now claimed by petitioner to raise a federal question where petitioner argued in the court below that the identical issue was controlled by state law?

2. Will this Court grant certiorari in a diversity case where (1) no federal question is presented, where (2) the only issues presented arise under the common law of Pennsylvania, and where (3) federal and state standards are substantially identical?

3. Does this case present an issue sufficiently important to command review by this court in view of the facts that (1) the Third Circuit refused to give its ruling general application and expressly limited its decision to the unique facts before it, that (2) the passage of various environmental statutes makes this case unlikely to recur in the federal courts, and that (3) the Third Circuit's decision is consistent with applicable precedent?

LIST OF PARTIES

Hercules Incorporated accepts as accurate petitioner's list of parties. In compliance with Rule 28.1, Hercules attaches a list of Hercules' foreign and domestic subsidiaries and affiliates. *See* Resp. Appendix at A-1-2.

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STATEMENT OF THE CASE

Petitioner Philadelphia Electric Company (hereinafter "PECO") filed this lawsuit against Respondent Hercules Incorporated (hereinafter "Hercules") and Gould, Inc. (hereinafter "Gould") for the costs of cleaning up certain materials leaching from industrial property owned by PECO into the Delaware River. PECO

claimed that the materials had been placed on the property by a former owner, Pennsylvania Industrial Chemical Corporation (hereinafter "PICCO"). PICCO had sold the property to Gould, which later sold the property to PECO. Hercules' liability was based on its status as an alleged successor to PICCO. Hercules had never owned the land in question or used the land for any purpose, but had purchased PICCO's remaining assets approximately two years after PICCO had sold the property. PECO's claims against Hercules were grounded in private and public nuisance and were limited to claims under the common law of the Commonwealth of Pennsylvania. The sole basis for federal jurisdiction was diversity of citizenship and an amount in controversy in excess of $10,000.00. *See* 28 U.S.C. §1332.

The case proceeded to a trial by jury. During that trial, PECO neither alleged nor introduced evidence that it used the Delaware River or that it was harmed by the alleged pollution of the River. (Pet. Appendix at A-25) Nonetheless, at the close of the evidence, the trial judge, over Hercules' objections, instructed the jury on principles of public and private nuisance. The jury returned a verdict in favor of PECO and against Hercules.

Hercules filed timely motions for judgment notwithstanding the verdict or for a new trial. After the district court denied Hercules' post-trial motions, Hercules appealed to the Third Circuit.

On appeal, the Third Circuit reversed the judgment against Hercules. The court held that PECO had no private nuisance cause of action against Hercules since the defect PECO complained about existed on PECO's own land. (Pet. Appendix at A-16-22) The Third Circuit held further that PECO had not stated a cause of action for public nusiance because it had not alleged or proved that it sustained harm while exercising a right common to the general public. (Pet. Appendix at A-22-25) Finally, the Third Circuit rejected, on two grounds, the indemnity claim which PECO had asserted for the first time in its

appellate brief. (Pet. Appendix at A-26) First, the court found that PECO had failed to prove that it was itself legally liable for the clean up of its property as required to recover indemnity under Pennsylvania law. (Pet. Appendix at A-27-29) Secondly, the court ruled that indemnity was not available where, as here, the liability of both parties was merely vicarious. (Pet. Appendix at A-29-30)

PECO filed a Petition for Rehearing in Banc with the Third Circuit. PECO claimed that the panel's decision was contrary to "controlling" Pennsylvania standing decisions. (Resp. Appendix at A-16) In fact, the heading of PECO's argument was:

> Under the Established Law of Public Nuisance in the Commonwealth of Pennsylvania, PECO Has the Requisite Standing to Maintain this Action Against Hercules.

(Resp. Appendix at A-6) PECO also argued that it was entitled to indemnification under Pennsylvania law. After its Petition for Rehearing was denied, PECO filed this petition for writ of certiorari. In this Court, however, PECO has changed its position on standing and now argues that the federal law of standing, rather than Pennsylvania's law, should control.

SUMMARY OF ARGUMENT

This diversity case does not present an issue which warrants review by this Court on certiorari. First, this case does not involve any federal question. Because this is a diversity case in which the law of Pennsylvania applies, the questions of whether PECO had stated a cause of action for public nuisance, whether it had standing to assert such a claim, and whether it was entitled to indemnification from Hercules are governed by the law of the Commonwealth of Pennsylvania. Although PECO now attempts to characterize the question of its standing

to assert a public nuisance as a federal question, it argued before the Third Circuit that Pennsylvania's law of standing applied. Moreover, contrary to PECO's present position, federal courts apply the state law of standing in diversity cases. Since the highest court of each state, and not this Court, is the ultimate arbiter of state law, a decision by this Court would have no binding effect either on similar state court lawsuits or similar federal court diversity lawsuits.

Secondly, this case is not of sufficient general importance to warrant review by this Court. PECO's only argument for the importance of this case is that a decision on standing does not bar relitigation. Under PECO's analysis, however, the danger of relitigation would be present with respect to any decision on standing. It does not make *this* case important. In addition, the Third Circuit's decision is narrow in scope. The Third Circuit expressly refused to give its ruling general application and limited its decision to the unique factual situation presented in this case. Moreover, the passage of various environmental statutes combined with the unique factual issues presented here make this case unlikely to recur.

Finally, PECO's claims for private nuisance[1] and public nuisance, as well as its last minute indemnification claim, were correctly rejected by the Third Circuit. The essence of a public nuisance is injury to the public. Because PECO failed to allege or prove that it had sustained an injury while exercising a right common to the public, the court determined that it had not stated a cause of action for public nuisance. PECO's indemnity claim was not included in its complaint and was not submitted to the jury; it was asserted as an afterthought in PECO's brief to the Third Circuit. The claim was rejected because PECO had not offered any evidence to

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1. Since PECO has not challenged the Third Circuit's ruling on private nuisance, Hercules will not discuss that aspect of the court's decision.

sustain an indemnification claim. More importantly, however, regardless of this failure of proof, indemnity was inapplicable as a matter of law since the liability of the parties was vicarious only. The Third Circuit's decision is fully consistent with the facts and with applicable precedent.

ARGUMENT

I. THIS CASE, IN WHICH THE SOLE BASIS FOR FEDERAL JURISDICTION WAS DIVERSITY OF CITIZENSHIP AND IN WHICH ONLY PENNSYLVANIA NUISANCE LAW ISSUES WERE INVOLVED, DOES NOT PRESENT A FEDERAL QUESTION.

The ultimate issues in this case, and the focus of the Third Circuit, was whether PECO had stated a cause of action under Pennsylvania law for public nuisance and/or indemnification. These issues do not involve any constitutional or federal statutory questions, but involve legal issues governed by the law of the Commonwealth of Pennsylvania. This Court does not review the considered determination of questions of state law by an intermediate federal appellate court. *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

PECO argues that certiorari should be granted on the ground that the Third Circuit's ruling was that PECO had no standing to sue in public nuisance and that this ruling contravened *federal* law. The latter part of this argument represents a dramatic shift in PECO's position. PECO itself recognized the inapplicability of the federal law of standing in its Petition for Rehearing In Banc to the Third Circuit. In fact, PECO argued in that petition that "the panel decision is contrary to the laws of the Commonwealth of Pennsylvania and to the decisions of the Supreme Court of Pennsylvania, *which law is controlling in this action*," on the standing issue.

(Resp. Appendix at A-16, emphasis added). PECO now attempts to shift positions in order to raise a federal issue for purposes of invoking this Court's discretionary jurisdiction. Such maneuvering does not create a basis for review on certiorari, however. This Court will not consider on a grant of certiorari bases for liability not argued below. *Miree v. DeKalb County*, 433 U.S. 25, 34 (1977). In this case, PECO attempts to go further than the petitioner in *Miree*. Here, PECO not only failed to argue that the federal law of standing applied, but argued the converse, that Pennsylvania law was controlling. This Court should not consider such an argument on a writ of certiorari.

Moreover, the Third Circuit's decision was actually grounded on PECO's failure to state a cause of action. The Third Circuit stated its holding as follows: "We hold only that in this case the purchaser of that land, PECO — though we recognize that it acted as a responsible corporate citizen — *had no cause of action* against the vendor's successor, Hercules, for private nuisance, public nuisance, or common law indemnity." (Pet. Appendix at A-31, emphasis added) As PECO itself acknowledges, under the *Erie* doctrine, "the requirements of a claim for public nuisance are state-law determinative." *See* PECO Petition at 8 n.3.

The Third Circuit did fully discuss the standing of PECO to bring a public nusiance claim. As illustrated by PECO's petition, however, the question of whether a private party has stated a cause of action in public nuisance is intertwined with the question of whether that party has standing. According, to PECO, in order to have standing, a plaintiff must have alleged some *particularized injury* that sets him apart from the man in the street; in order to have stated a cause of action, plaintiff must plead, and prove, a *particular damage*, different in kind and degree from that suffered by the general public. *See* PECO Petition at 18. No meaningful distinction can be drawn between these two inquiries.

Contrary to PECO's contention before this Court, the question of standing in diversity cases is a matter of state law, not federal law.[2] Federal concepts of standing developed to regulate enforcement of federal rights do not represent any independent interest of the federal courts that justifies disregarding state law in the diversity context. 13A C. Wright, A Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* 2d §3531.14, at 84 (1984). This rule has long been recognized by this Court and other federal courts. For example, in *Williams v. Mayor of Baltimore*, 289 U.S. 36, 48 (1933), this Court ruled that state law determines who has standing to challenge the constitutionality of a state statute on the ground that it violates a state constitution.

This principle has been reaffirmed in recent decisions of the intermediate federal appellate courts. For example, in *Beckman Cotton Co. v. First National Bank*, 666 F.2d 181, 183 (5th Cir. 1982), the court applied Georgia law to determine plaintiff's standing to sue in a diversity case. *See also City of Moore v. Atchison, Topeka, & Santa Fe Railway Co.*, 699 F.2d 507, 511 (10th Cir. 1983) (in a diversity suit, state law determines standing of city to challenge state statute exempting railroads from city zoning power); *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733, 747-48 & n.8 (8th Cir. 1982), *cert. denied sub nom. Drury v. Westborough Mall, Inc.*, 461 U.S. 945 (1983) (state law of standing applied to claims that city's zoning actions violated state law); *Wamp v. Chattanooga Housing Authority*, 527 F.2d 595 (6th Cir. 1975), *cert. denied*, 425 U.S. 992 (1976) (since plaintiff did not have standing to maintain action in state court, federal court had no removal jurisdiction).

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2. PECO does not even attempt to characterize the issue of whether it was entitled to indemnification as a federal question. The indemnification issue is unquestionably a matter of state law.

In fact, the very commentator cited by PECO on the question of the applicable law for standing determinations rejects petitioner's argument. In discussing the effect of state law on standing in federal diversity cases, Wright says: "[A]s to litigation involving state rights but commenced in federal courts or removed to them, state law [of standing] ordinarily should apply." 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* 2d §3531.14, at 84 (1984). The cases cited by PECO stand for the proposition that the federal law of standing applies only when a plaintiff is asserting federal rights. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 262 n.8 (1976) (state law of standing does not govern where plaintiff is seeking relief in federal courts for an asserted injury to its federal rights). Since PECO asserted no federal rights, the federal law of standing has no applicability.

Whether the federal or Pennsylvania law of standing is applied, the test is substantially the same: (1) whether plaintiff alleges that the challenged activity has caused him injury in fact and (2) whether the interest sought to be protected by the complainant is arguably within the zone of interests sought to be protected. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152, 153 (1970); *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269, 283-84 (1975). Standing rulings are not made in a vacuum, but require consideration of the "specific circumstances of the individual circumstances." *See United States ex rel. Chapman v. Federal Power Comm'n*, 345 U.S. 153, 156 (1953). The Third Circuit found that PECO had never alleged or proved that it had sustained a "particular injury" while exercising a right common to the general public as required under applicable public nusiance principles. (Pet. Appendix at A-25) Therefore, PECO could not meet either federal or Pennsylvania standing requirements.

In a diversity case, the lower federal courts and this Court are bound to follow applicable state law. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). "Federal court decisions in diversity cases have no precedential value as state law and only determine the issues between the parties." *Peterson v. U-Haul Co.,* 409 F.2d 1174, 1177 (8th Cir. 1969). As a result, this Court's interpretation or application of state law will not prevent a different resolution of this issue by the state courts. *See, e.g., Brady v. Maryland,* 373 U.S. 83, 90 (1963); *Commonwealth v. Geschwendt,* 500 Pa. 120, 128, 454 A.2d 991, 995 (1982). Only issues of state law were presented in this diversity suit. Therefore, the petition for writ of certiorari should be denied.

II. THE ISSUES ARE NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S REVIEW SINCE THE THIRD CIRCUIT'S DECISION WAS NARROW IN SCOPE AND INVOLVED ISSUES UNLIKELY TO RECUR IN THE FEDERAL COURTS.

Rule 17 of the Rules of the Supreme Court of the United States provides that this Court will grant review on a writ of certiorari "only when there are special and important reasons therefore." PECO has not made any showing that this case is of sufficient general importance to warrant review by this Court.

The only argument made by PECO to show the alleged importance of this case is its claim that a decision on standing does not preclude further litigation of the dispute by the parties. *See* PECO Petition at 14-17. As stated above, the holding of the Third Circuit was that PECO had not stated a cause of action for public nuisance. Therefore, this argument is immaterial.

Furthermore, even if the Third Circuit's decision is viewed as a standing decision, the argument that relitigation may result does not demonstrate the importance of this case. According to PECO, a ruling that any

plaintiff lacked standing would not bar a later suit based upon the same factual allegations.[3] Therefore, under PECO's analysis, the danger of relitigation argument could be made with respect to virtually any standing determination. PECO's argument proves too much. Surely it was not intended that this court would grant review on certiorari in any case which was dismissed for lack of standing.

In addition, it must again be noted that petitioner did not raise the danger of relitigation issue in its Petition for Rehearing In Banc to the Third Circuit. (Resp. Appendix at A-6-10) Petitioner should have raised this issue below when it had the opportunity.

That this case is lacking in the importance required for this Court to exercise its discretionary jurisdiction is further demonstrated by the limited nature of the Third Circuit's ruling. The decision, contrary to PECO's exaggerated view of its impact, *See* PECO Petition at 6, says nothing about the rights of purchasers and sellers of real estate generally. To the contrary, the Third Circuit was careful to expressly limit its decision to a determination that, based on the evidence presented in this case, PECO had no cause of action under Pennsylvania law against Hercules for private nuisance, public nuisance or common law indemnity. (Pet. Appendix at A-31)

Finally, the issue in this case is unlikely to recur in the federal courts. The federal common law of nuisance

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3. Contrary to PECO's claim, PECO would be barred from further litigation in this case. First, the Third Circuit's actual holding was that PECO had not stated a cause of action. Dismissal for failure to state a proper cause of action is a judgment on the merits. *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 399 n.3 (1981); *Bell v. Hood,* 327 U.S. 678, 682 (1946). Moreover, *McCarney v. Ford Motor Co.,* 657 F.2d 230, 231 (8th Cir. 1981), which PECO cites as support, is inapplicable. In *McCarney,* the court addressed only the "narrow issue of whether a dismissal for lack of standing *to invoke a particular statute* can act as a bar to a later suit based upon the same factual allegations." (Emphasis added) It has no applicability to a case based on various common law theories.

has been preempted by the various federal environmental statutes. *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.*, 453 U.S. 1, 22 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). The Third Circuit recognized that an extension of common law nuisance would be inadvisable since "Congress and the state legislatures are actively seeking to achieve a socially acceptable definition of rights and liabilities." *See* Pet. Appendix at A-22. Therefore, the issues presented here would arise only in those diversity cases where a purchaser of land sought recovery in nuisance from the seller of that land for an alleged defect existing in the property. Such claims will be limited in number.

This Court grants review on certiorari only to resolve issues of general importance as distinguished from cases only of importance to the parties. *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1950). The only real questions PECO raises in its Petition turn on the particular facts of this case alone and are of interest only to the parties to it. Given the limited scope of the Third Circuit's decision and the improbability of recurring litigation of this nature, this case does not merit review by this Court on certiorari.

III. PECO'S CLAIMS WERE PROPERLY REJECTED BY THE THIRD CIRCUIT.

A final reason for denying the PECO petition is that each claim for which it seeks review was correctly rejected by the Third Circuit.

A. *PECO Did Not State Or Prove A Public Nuisance Claim Since It Did Not Allege That It Sustained Harm While Exercising A Right Common To The General Public.*

The essence of PECO's public nuisance claim was that its land was damaged by the presence of contaminants which were leaching from its land into the Delaware River. By way of contrast, the essence of a public nuisance is injury to the public. *Pennsylvania Society for the Prevention of Cruelty to Animals v. Bravo Enterprises, Inc.*, 428 Pa. 350, 237 A.2d 342, 348 (1968). As a result, in order for a private plaintiff to recover damages for a public nuisance, it must have "suffered harm of a kind different from that suffered by other members of the public *exercising the right common to the general public* that was the subject of interference." Restatement (Second) of Torts §821C (1979) (emphasis added). PECO never alleged or attempted to show that it was making any use of the Delaware River or that it was harmed in any way by the alleged contamination of those waters. Instead PECO focused on the condition of its own property.

The Third Circuit, consistent with applicable precedent, found that PECO had not made out a claim for public nuisance because it found that PECO had made no allegation nor offered any evidence that it had sustained any harm while exercising a right common to the general public. (Pet. Appendix at A-24-25) This limit on private actions for public nuisance has been recognized by the courts, the Restatement and the leading commentator on tort law. *See, e.g., O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 658 (E.D. Pa. 1981) (public nuisance claim brought by private individuals dismissed where plaintiffs proved only that contaminants were entering a creek, but failed to show harm to users of the creek caused by the leachate discharges); *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973), *aff'd*, 559

F.2d 1200 (1st Cir. 1977) (public nuisance claims brought by businessmen who alleged economic harm from pollution of a lake dismissed where plaintiffs did not assert any interference with their exercise of a public right); Restatement (Second) of Torts §821C (1979) (in order to recover damages in an individual action for public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference); W. Prosser, *The Law of Torts*, §88, at 586 (4th ed. 1971) (private individual has no action for invasion of public right unless he is injured by public nuisance over and above the injury suffered by public generally).

Furthermore, the Third Circuit properly distinguished the facts of this case from public nuisance claims by riparian landowners whose property was damaged by pollution. (Pet. Appendix at A-25) In each of those cases, the damage to the property was *caused* by the pollution of the river; here it is alleged that PECO's property was the *source* of the pollution of the Delaware River. This case presents the inverse of a public nuisance.

B. *PECO's Eleventh-Hour Attempt To Assert A Cause Of Action For Indemnification Was Properly Rejected By The Third Circuit Because PECO Failed To Prove That It Was Legally Liable For The Cleanup Of The Site And Because There Can Be No Common Law Indemnification As Between Parties Whose Liability Is Merely Vicarious.*

In its Brief to the Third Circuit, PECO argued for the first time that it was entitled to recovery on common law principles of indemnification. The Third Circuit properly rejected this claim finding: (1) that the record did not support affirmance on the basis of a cause of action never pleaded, proved, nor submitted to the jury and (2) that

there could be no common law indemnification between two parties whose liability is merely vicarious. (Pet. Appendix at A-25-31) The Third Circuit's decision is consistent with applicable Pennsylvania law.

The initial problem with PECO's indemnification claim was that the evidence submitted by PECO did not support it. This is not surprising since PECO had never pleaded, proved nor submitted the indemnification issue to the jury. (Pet. Appendix at A-26) In fact, the issue was first raised by PECO in its appellate brief. Under Pennsylvania law, PECO was required, *inter alia*, to prove that it was legally liable for the cleanup of the PECO site in order to recover indemnity. *Tugboat Indian Co. v. A/S Ivarans Rederi*, 334 Pa. 15, 21, 5 A.2d 153, 156 (1939). Finding no such evidence, the Third Circuit properly rejected PECO's claim. PECO ignores this fundamental failure of proof in its petition to this Court.

The Third Circuit also found that as a matter of law there could be no indemnity between two parties whose liability is vicarious. In this case, PECO's liability was based on its status as successor to PICCO in title to the land; Hercules' alleged liability was based on its status as successor to PICCO's other assets. The Third Circuit's decision was based on the general rule that indemnity turns upon whether the difference in the gravity of the faults of the participants is so great as to throw the whole loss upon one. (Pet. Appendix at A-30) Once again this ruling is fully consistent with applicable precedent which holds that there can be no indemnification between two parties whose liability is vicarious. *See Liberty Mutual Insurance Co. v. Curtis Noll Corp.*, 112 Mich. App. 182, 315 N.W.2d 890 (1982).

The Third Circuit gave full consideration to the issues and decided them correctly and fairly. The Third Circuit's reasoning and conclusions showed a scholarly attempt to ascertain what the Pennsylvania courts would have done in an area described by Prosser as an "impenetrable jungle." W. Prosser, *Handbook of the Law of*

Torts §86, at 571 (4th ed. 1971). The case was fully consistent with relevant Pennsylvania precedent. As a result, the decision was entirely in accordance with the principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Therefore, the petition for writ of certiorari should be denied.

CONCLUSION

Based upon the foregoing reasons, Respondent Hercules Incorporated respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

By_____
John Gerald Gleeson
Hercules Incorporated
Hercules Plaza
Wilmington, DE 19894
(302) 594-7004

FRUMKIN & MANTA

By_____
Joseph G. Manta
John C. Sullivan
Suite 1818
Three Penn Center Plaza
Philadelphia, PA 19102
(215) 988-0777

Attorneys for Respondent Hercules Incorporated

APPENDIX TO HERCULES INCORPORATED'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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HERCULES' SUBSIDIARIES AND AFFILIATED COMPANIES

Consolidated, Wholly Owned Subsidiaries
(Directly or Indirectly)

AUSTRIA
Patex Chemie GmbH, Traun

THE BAHAMAS
Hercules International Trade Corporation Limited (HINTCO), Nassau

BELGIUM
Hercules Chemicals N.V., Beringen

BRAZIL
Hercules do Brasil Produtos Quimicos Ltda., Sao Paulo

CANADA
Hercules Canada Inc., Mississauga, Ontario

DENMARK
A/S Kobenhavns Pektinfabrik, Lille Skensved

ENGLAND
Hercules Limited, London
The Holden Vale Manufacturing Company, Limited, Haslingden
PFW Ltd., Perivale

FINLAND
Oy Hercofinn Ab, Helsinki

FRANCE
Hercules France S.A., Paris

GERMANY
Hercules GmbH, Hamburg
Pomosin AG, Grossenbrode

HONG KONG
Hercochem (H.K.) Ltd.

ITALY
Hercules Bewoid Italia S.p.A., Milan
Cesalpinia S.p.A., Milan

JAPAN
Hercules Far East K.K., Tokyo

MEXICO
Quimica Hercules, S.A. de C.V., Mexico, D.F.

THE NETHERLANDS
Hercules B.V., Rijswijk
PFW (Nederland) B.V., Amersfoort

SINGAPORE
Hersean Pte Ltd., Singapore

SPAIN
Ceratonia, Sociedad Anonima, Tarragona
Rohe, S.A., Tarragona

SWEDEN
Hercules Kemiska Aktiebolag, Goteborg

UNITED STATES
Caribbean Lumber Company, Inc., Savannah, Georgia
Champlain Cable Corporation, Wilmington, Delaware
Esgraph Incorporated, Cerritos, California
Hercules Chemical Corporation, Wilmington, Delaware
Hercules Overseas Corporation, Wilmington, Delaware
Hercules Trading Corporation, Wilmington, Delaware
Simmonds Precision Products, Inc., Tarrytown, New York

Consolidated, Joint-Venture Companies
(Percent Directly Owned)

UNITED STATES
Hercofina, Wilmington, North Carolina (74%)
Hercofina (Delaware), Wilmington, Delaware (74%)
Lextar, Wilmington, Delaware (100%)

Affiliated Companies
(Percent Directly or Indirectly Owned by Hercules)

AUSTRALIA
Australian Chemical Holdings Limited, Botany, New South Wales (60%);
Hercules Chemicals Australia Pty. Ltd., Melbourne (60%);
Spurway Cooke Holdings Limited, Sidney (36%)

BELGIUM
HIMONT Belgium N.V., Beringen (50%)

BERMUDA
Curtis Bay Insurance Co. Ltd., Hamilton (100%)

BRAZIL
Companhia Brasileira de Produtos Quimicos Bononia, Sao Paulo (40%);
Polo Filme Industria e Comercio, Ltda., Sao Paulo (49%);
PPH — Companhia Industrial de Polipropileno, Porto Alegre (38%)

CANADA
HIMONT Canada Inc., Mississauga, Ontario (50%)

ENGLAND
Nelsons Acetate Limited, Lancaster (50%)

GERMANY
Abieta Chemie GmbH, Augsburg (50%)

INDIA
Herdillia Chemicals Limited, Bombay (22%);
Indian Gum Industries Limited, Bombay (49%)

ITALY
HIMONT Italia S.p.A., Milan (50%);
Neofil S.p.A., Milan (50%)

JAPAN
DIC-Hercules Chemicals Incorporated, Tokyo (50%);
Japan Magnetics, Ltd., Tokyo (50%);
Rika-Hercules Incorporated, Osaka (50%);
Sumika-Hercules Company, Ltd., Osaka (50%);
Teijin Hercules Chemical Company Limited, Tokyo (49%)

MEXICO
Petrocel, S.A., Tampico (30%);
Taloquimia, S.A., Chihuahua (49%)

THE NETHERLANDS ANTILLES
Erbamont, N.V. (13%);
Finance Company of Hercules, Inc. N.V. (100%)

NEW ZEALAND
A. C. Hatrick (N.Z.) Ltd., Auckland (60%)

PAKISTAN
Dawood Hercules Chemicals Limited, Lahore (40%);
Pakistan Gum Industries Limited, Karachi (49%)

TAIWAN
Taiwan Hercules Chemicals Inc., Taipei (67%);
Taiwan Polypropylene Company Limited, Taipei (40%)

UNITED STATES
Hercules Credit, Inc., Wilmington, Delaware (100%);
HIMONT Incorporated, Wilmington, Delaware (50%);
HIMONT U.S.A., Inc., Wilmington, Delaware (50%);
Texas Alkyls, Inc., Deer Park, Texas (50%)

VIRGIN ISLANDS
St. Croix Petrochemical Corp., St. Croix (37%)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PHILADELPHIA ELECTRIC COMPANY	:	
Appellee	:	
v.	:	Appeal No. 84-1159
HERCULES INCORPORATED,	:	
and	:	
GOULD, INC.,	:	
Hercules, Inc., Appellant	:	

APPELLEE PHILADELPHIA ELECTRIC COMPANY'S PETITION FOR REHEARING IN BANC PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE NO. 40

JOSEPH M. DONLEY, ESQ.
Kittredge, Kaufman & Donley
121 South Broad Street, 8th Flr.
Philadelphia, PA 19103
(215) 732-2700

PETITION OF PHILADELPHIA ELECTRIC COMPANY FOR REHEARING BEFORE THE COURT IN BANC

Petitioner-Appellee, Philadelphia Electric Company ("PECO"), pursuant to Rule 40 of the Federal Rules of Appellate Procedure, respectfully requests this Honorable Court to grant it a rehearing in banc of the appeal in the above-captioned action, in which a panel of this Court ("the Panel") vacated the injunction and reversed the judgment entered by the district court, which was based upon a jury verdict in favor of PECO and against Defendant Appellant Hercules, Inc. ("Hercules").

The Panel by its judgment and opinion of May 28, 1985, has upset a jury verdict, which found that Hercules through its predecessor in interest ("PICCO") had created a public nuisance on land now owned by PECO, and was responsible to PECO for the cost of the clean-up and to further abate the nuisance. The nuisance consisted of deposits of resinous materials and other contaminants, some of which are known or suspected carcinogens, which have polluted and continue to pollute and damage PECO's property, the groundwater on and under PECO's property and the Delaware River. The evidence produced at trial virtually fingerprinted the contaminants as being products produced by Hercules' predecessor, PICCO. Both the trial court and the Panel agreed that Hercules had expressly assumed PICCO's liability for the nuisance PICCO created at the Chester site.[1] The jury specifically found in answer to special interrogatories that a nuisance was created and that Hercules had created it, that it continues to pollute

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1. Since both the trial court and the Panel found that a de facto merger had occurred between PICCO and Hercules and that Hercules had expressly assumed PICCO's liability for the pollution of the Chester site, PECO will simply refer to PICCO as Hercules. (Slip Opinion pp. 8-16) Philadelphia Electric Company v. Hercules, Inc. and Gould, Inc., No. 84-1159, slip. op. at 8-16 (3d Cir. May 28, 1985) (hereinafter cited to as "Slip Op. at ").

PECO's property, PECO's groundwater and the Delaware River. There is no question that PECO had nothing to do with the creation of the nuisance and that PECO expended $345,906.69 in a reasonable attempt to curtail the pollution of the groundwater and the Delaware. Yet, the Panel in overturning the jury's verdict found in essence that PECO had no "standing" to assert any claims against Hercules.

PECO requests this rehearing on the grounds that this matter: (1) involves questions of exceptional importance; (2) concerns a matter of first impression both in this Circuit, and, to the knowledge of PECO, one which has never been specifically addressed by any other court in the United States; (3) concerns critical issues of economic, environmental and social circumstances; and because the Panel's opinion: (4) creates a dangerous precedent which unduly restricts and emasculates the doctrines of private and public nuisance and indemnification, which are recognized as necessary to remedy serious environmental hazards, contrary to existing principles of Pennsylvania law[2]; (5) is self-contradictory in its finding that Hercules expressly assumed the liability of PICCO for the pollution of the site and the nuisance created thereby, but that Hercules is not responsible to PECO for indemnification or nuisance which PICCO would have been; and (6) frustrates and undermines the constitutional rights guaranteed by the Commonwealth of Pennsylvania to ensure every person the right to clean air, pure water and the preservation of

2. Nor did the Panel even address the series of cases which recognize the "environmental tort" as the nuisance par excellance of the modern world. See, e.g., *New Jersey Department of Transportation v. PSC Resources, Inc.* 175 N.J. Super 447, 419 A.2d 1151 (1980); *New Jersey Department of Environmental Protection v. Ventron Corporation*, 94 N]J] 254, 463 A.2d 893 (1983); *New Jersey Department of Environmental Protection v. Exxon Corporation*, 151 N.J. Super 464, 376 A.2d 1339 (1997); *New York v. Ole Olsen, Ltd.*, 76 Misc. 2d 796, 352 N.Y.S. 2d 97 (1973) aff'd 357 N.Y.S. 2d 1016 (1974).

the natural environment. As set forth herein, the rehearing of this matter by the Court in banc is most important to correct an erroneous application of Pennsyylvania law to the circumstances of this case, which although is one of first impression, will become a vital area of the law in addressing problems of hazardous waste disposal, protection of the natural environment and placing the responsibility upon those who cause environmental and health threats by their operating and disposal practices.

A. Under the Established Law of Public Nuisance in the Commonwealth of Pennsylvania, PECO Has the Requisite Standing to Maintain this Action Against Hercules[3]

The Panel of this Court by its decision of May 28, 1985, has shifted the responsibility of the public nuisance from the party who created it to the one most damaged by it. As the Panel and the trial court aptly recognized, Hercules stands in the shoes of PICCO under concepts of de facto merger and as a result of its express assumption of PICCO's liabilities. (Slip Op. at 9-16) Accordingly, the Panel's attempt to paint Hercules as being innocent and without knowledge as to the creation of the nuisance is both irrelevant and inaccurate; PICCO is now Hercules; Hercules is now PICCO. The legal fiction of the "corporate entity" requires acceptance of this principal without qualification as to Hercules personal "fault". As the Panel stated: "We conclude that Hercules has assumed any liability PICCO may have had due to pollution of the Chester site." (Slip Op. at 11)

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3. While PECO also disagrees with the Panel's unduly conservative analysis of PECO's private nuisance claim and believes the Pennsylvania Supreme Court would reach a contrary result, PECO believes that it is unnecessary to reach that more difficult decision in order to prevail on its claims against Hercules, and therefore, will not address them herein.

But regardless of whether this Court characterizes Hercules as being blameless, Hercules is legally liable for abating the nuisance created by PICCO and it should not be permitted to side-step this responsibility by a finding, (on an issue raised for the first time before this Court) which requires a tortiously restrictive analysis of the "standing" requirement.[4]

The general rule, of course, has been that a private individual has no standing to sue for the abatement of a public nuisance if his injury is only that which is shared by the public generally. See, *Holloway v. Bristol-Myers Corporation*, 327 F. Supp. 17 (D.C.C. 1971), *aff'd*, 485 F.2d 986 (1973); W. Prosser, Law of Torts 188, at 583 (4th ed. 1971). This rule developed in the early common law because harm to the public order, decency or morals was considered a crime against the king. *See* Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997 (1966). Only the king, therefore, could bring an action against the perpetrator of the nuisance. The sole exception to this rule was that a member of the public had standing to sue if he suffered a special injury, which was different in kind from the general public. *See, e.g., Hardy Salt Company v. Southern Pacific Transportation Company*, 501 F.2d 1156 (19th Cir. 1974), *cert denied* 419 U.S. 1033 (1974). The purpose of the rule was to prevent a multiplicity of actions and frivolous suits. Neither of these concerns could even arguably be considered to be a factor in denying PECO standing in the case.

As for whether PECO satisfies the requirements of the Restatement (Second) of Torts §821C (1977), which the Panel found applicable, the pleadings, PECO's pretrial memorandum, the evidence presented at trial and the specific findings of the jury all belie the Panel's conclusion that PECO did not allege or suffer any injury in

4. PECO submits that the Pennsylvania Supreme Court would adopt the more liberal standing requirement expressed by the Hawaii Supreme Court in *Akau v. Olomana Corp.*, 65 Hawaii 383 (1982), than that applied by the Panel in this case.

the exercise of a right common to the general public that was the subject of the interference. (Slip Op. at 24-25. The Panel states that: "If PECO — as a riparian landowner — had suffered damage to its land or its operations as a result of the pollution of the Delaware, it would possibly have a claim for public nuisance. But the condition of the Chester site was not the *result* of the pollution, it was the *cause* of it." (Slip Op. at 25) (emphasis in original). It is obvious from this statement that the Panel failed to focus upon a very key element of the case and the evidence presented at trial: It was the *pollutants* (i.e., PICCO resinous materials) *which were the cause of the contaminated condition of the Chester site, including PECO's soil and groundwater, and the contamination* of the *Delware River*. Thus, the public water both in the Delaware and the groundwater flowing on PECO's land was and continues to be contaminated by the nuisance Hercules created.

The groundwater and the Delaware River are natural resources belonging to the citizens of Pennsylvania and entrusted to DER. As the result of the contamination of these resources by Hercules, the public at large was and continues to be harmed. As owner of the property temporarily responsible for these natural resources, PECO was specifically harmed by both the damages to its property and the contamination of its groundwater and by DER's request to abate the polluting condition. *See, National Wood Preservers, Inc. v. Commonwealth Department of Environmental Resources*, 489 Pa. 221, 414 A.2d 37 (1980). That abatement, as of the time of trial, cost PECO $345,906.690. That expense is, indeed, harm of a kind different from and greater in degree than that suffered by other members of the public, in the exercise of a right common to the general public.

PECO pleaded and proved that as a result of the offensive nuisance created by Hercules, *not only* was the Delaware River being polluted but so was PECO's soil and groundwater. (J.A. 319-20; 341; 351-60; 430-31;

437-38; 469-84; 603-15; 644-48). Not only did PECO demonstrate that the soil and groundwater were being contaminated by the nuisance, but also that it was injured in the use and enjoyment of its property by the loss of rentals from its tenant as a result of the same pollutant which were contaminating the Delaware River. (J.A. 267-272)

The right to reasonable groundwater use and enjoyment is a right which all landowners possess and is also considered a public right. Restatement (Second) of Torts §821C comment (h) (1977); Pennsylvania Clean Stream Law, 35 P.S. §§691.1, 691.4. The case law is supportive of PECO's position that it has suffered special damages qualifying it as having the requisite standing. See, e.g., *Akau v. Olomana Corproation*, 65 Hawaii 383 (1921); *Heinl v. Pecher*, 330 Pa. 232, 198 A. 797 (1938); *Frady v. Portland General Electric Co.*, 637 P.2d 1345 (Or. App. 1981).

In *Heinl v. Pecher*, 330 Pa. 232, 198 A. 797 (1938), defendant erected an incinerator plant intended for the burning and disposal of garbage. The residents living adjacent to the plant brought an action for public nuisance to restrain defendants from operating the plant on the grounds that the defendants had not obtained a building permit and non-compliance with the applicable zoning statute was declared to be a nuisance. The Court affirmed the lower court's holding, "[s]ince plaintiffs alleged that the building was erected as an incinerator plant in violation of the ordinances of the township and since the building ordinance provides that a building erected in violation of its provisions shall be 'declared a nuisance' and 'may be abated' . . ." and the allegations were sustained by the evidence. *Id.* at 236, 918 A. at 799.

In *Heinl*, Defendants argued that plaintiffs had no right to bring the action for public wrongs. In response, the Court pointed out that since the violation of the ordinance was declared to be a nuisance, the private individual does have a right to bring the action as long as the

plaintiff's injury complained of is "only greater in degree" than that of the public. *Id.* at 238, 198 A. at 799. Also, defendants argued, on appeal, that plaintiffs showed only that the neighborhood would be depreciated and that was not sufficient damage to support a claim for public nuisance. The Supreme Court dismissed this argument on the ground that:

> 'Equitable relief must be predicated on an injurious invasion of a fixed and determined property right. By injury is meant something affecting the capacity of the property for ordinary use or causing a discomfort in the enjoyment of it that threatens the health or welfare of the occupant, with resultant injury to the property . . .'

Id. at 239, 198 A. at 800 (quoting *Pennsylvania Co. v. Sun Co.*, 290 Pa. 404, 138 A. 909)

As several of the plaintiffs lived adjacent to the incinerator plant, the Court held that, by operation of the plant, they would suffer "discomfort in the enjoyment" of their property.[5] *Id.* at 239, 198 A. at 800 (citation omitted).

It is difficult to fathom how, if this Court is applying Pennsylvania law, it can conclude that PECO did not suffer the requisite injury to give it standing in light of the Supereme Court's opinion in *Heinl*. For as recognized by Dean Prossser: "When a public nusiance substantially interferes with the use or enjoyment of the plaintiff's rights in land, it *never* has been disputed that there is a particular kind of damage, for which the private action will lie." Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 1018 (1966) (footnote omitted) (emphasis added).

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5. Although as of the time of the action, the incineration had never been in operation.

B. *As a Matter of the Law of the Commonwealth of Pennsylvania, PECO is Entitled to Indemnification From Hercules*

Contrary to the Panel's determination, the record clearly supports the conclusion that PECO "could have been compelled" through legal action taken by DER pursuant to the Clean Streams Law to incur the abatement expenses for the nuisance created by Hercules. Section 691.316 of the Clean Streams Law specifically provides in pertinent part:

> Whenever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, "landowner" includes any person holding title to or having a proprietary interest in either surface or subsurface rights.

The Pennsylvania Supreme Court has upheld this provision as constitutional in *National Wood Preserves, Inc. v. Commonwealth Department of Environmental Resources*, 489 Pa. 221, 414 A.2d 37 (1980).

Under the Pennsylvania Clean Stream Law, "pollution" is defined as "contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance . . ." §691.1. The jury specifically found that Hercules had created a nuisance which was polluting or contaminating the Delaware River and PECO's groundwater.[6] (J.A. 796-801) There was nothing further to sub-

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6. Section 691.1 also defines "Waters of the Commonwealth" as: ". . . any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds,

mit to the jury on the issue of indemnification. It is simply a matter of applying Pennsylvania law to the findings of the jury; the reasonableness and amount of the clean-up costs were conceded by Hercules' counsel. (J.A. 206).

Under federal practice it is not necessary to plead "causes of action", but merely to state a claim for relief. That PECO clearly did throughout and there cannt be any claim of "surprise" by Hercules[7] as to the fact that PECO was seeking recovery of its clean-up costs.

The Panel then tries to justify not shifting the responsibility to Hercules where it properly lies on the basis that Hercules was not the culprit , rather it was PICCO. (Slip Op. at 30) But such an "equitable" analysis contradicts the Panel's holding that Hercules is PICCO by virtue of the de facto merger doctrine and the Panel's holding that: ". . . Hercules has [expressly] assumed any liability PICCO may have had due to the pollution of the Chester site." (Slip Op. at 11) Surely PICCO (ergo Hercules) "was best suited to prevent the pollution". (Slip Op. at 30) Is there any question but that PICCO, if it had not been merged into Hercules, would have had to

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NOTES *(Continued)*

springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth."

7. Indeed Hercules' entire defense of this case until the time of appeal was that it was not liable to PECO because it was not PICCO's successor in interest and had not assumed this obligation. Hercules took virtually no discovery, it filed no interrogatories or requests for production of documents. It did not view the site although PECO offered it the opportunity. Hercules' counsel stated in his opening; ". . . so that if you find the condition [PECO] alleges is the fault of PICCO, then your verdict will be against Hercules." (J.A. 205) During the course of the trial PECO submitted expert evidence which virtually "fingerprinted" the pollutants as PICCO products which were contaminating PECO's groundwater and the Delaware River. (J.A. 473-84; 645-48) Hercules offered no contrary expert opinion evidence.

answer to PECO in both public nuisance and indemnification? The Panel seemed to be swayed by the "fairness" of making PECO bear the responsibility because ". . . PECO had an opportunity to protect itself through inspection and negotiation. . ." (Slip Op. at 30) But even if that consideration had *any* bearing on the issues before this Court, it ignores the reality of the case and the evidence. PECO asserted, and evidence so established, that the buried contaminants were a latent condition undiscovered until years later. (J.A. 10, 257) Indeed, Hercules' defense proffered through former PICCO employees was that PICCO had not deposited the pollutants of which PECO and DER complained. (J.A. 520-22; 528-539) It is difficult to understand why the Panel believes it is fairer to shift the burden for this nuisance to PECO, who certainly had nothing to do with its creation, rather than to the party who created it yet to this day denies it. How was PECO to negotiate a "fair price" for land saddled with a latent condition which is a public nuisance, when the perpetrator of the nuisance to this day denies it and that party was not even PECO's seller.[8] Even if this Court somehow concludes that PECO and Hercules are on 'equal footing' with regard to the Chester site, shouldn't the principles of contribution apply? *See, e.g., State v. City of San Francisco,* 94 Cal. App. 3d 522, 156 Cal. Rptr. 542 (1979).

But once the court determined that Hercules assumed the liability for the Chester site, it acknowledged that Hercules is primarily liable and it, not PECO, should bear the burden of abatement. Despite disclaimers to the contrary, the Panel's self-contradictory opinion does stand for the proposition that ". . . a party that contaminates land, . . . can escape liability by the expedient of selling the land". (Slip Op. at 31)

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8. Nor was there any evidence that Gould knew of the existence of the pollutants which caused the public nuisance. The only evidence was that the condition which was caused by the resinous pollutants was a latent condition.

SUMMARY

The decision of the Panel in this case is contrary to the law of public nuisance as established in Pennsylvania, since PECO obviously has standing in that the pollutants which cause the nuisance have damaged PECO's property, interfered with PECO's use and enjoyment of its property, and polluted the groundwater on its property which then flows into the Delaware. PECO was, and continues to be, specially harmed in the exercise of its right to pure groundwater and uncontaminated soil, a right common to the general public, but which the Pennsylvania Clean Streams Law imposes an added obligation on a landowner to protect under Section 691.316. The monies PECO expended in abating the nuisance were in furtherance of these common rights and that attendant obligation. Moreover, PECO submits that the Supreme Court of Pennsyvlania would not apply such a restrictive standard for standing given its decision in *Heinl v. Pecher*, supra.

PECO further admits that the Panel's decision is self-contradictory in its analysis of PECO's right to indemnification in light of its holding that Hercules has expressly assumed the liability PICCO had for the pollution of the Chester site. Thus, the Panel's consideration of when Hercules acquired PICCO was inappropriate. PECO proved each and every element necessary to entitle it to indemnification from Hercules.

If the Panel's decision is permitted to stand, it will establish a precedent contrary to the law and public policy of Pennsylvania in requiring the one who caused the nuisance to correct it, and will haunt for years to come the development of the law of public and private nuisance in the area of environmental protection and hazardous waste disposal. Accordingly, PECO respectfully requests that its Petition for Reargument be granted.

Respectfully submitted,

KITTREDGE, KAUFMAN
& DONLEY

Joseph M. Donley
Robert Emmet Hernan
121 South Broad Street
8th Floor
Philadelphia, PA 19107
(215) 732-2700

Attorneys for Petitioner
Philadelphia Electric Company

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PHILADELPHIA ELECTRIC COMPANY	:	
Appellee	:	
v.	:	Appeal No. 84: 1159
HERCULES INCORPORATED,	:	
Appellant	:	
and	:	
GOULD, INC.,	:	
Appellee	:	

STATEMENT OF COUNSEL PURSUANT TO RULE 22 OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

I express a belief, based on a reasoned and studied professional judgment that the panel decision is contrary to the laws of the Commonwealth of Pennsylvania and to the decisions of the Supreme Court of Pennsylvania, which law is controlling in this action, to wit, the panel's decision is contrary to the decision of *Heinl v. Pecher*, 330 Pa. 232, 198A. 797 (1938) and Article I, §27 of the Pennsylvania Constitution, and 35 Pa. C.S.A. §691.1 et seq. And, that this appeal involves a question of exceptional importance, to wit, whether the panel decision establishes a precedent which encourages a party who contaminates land to escape liability by divesting itself of that land, while shifting the sole responsibility for abating the public nuisance to an innocent property owner who's land and groundwater is contaminated by the nuiusance, which is a case of first impression that

presents critical issues of economic, environmental and social circumstances.

Respectfully submitted,

KITTREDGE, KAUFMAN
& DONLEY

Joseph M. Donley
121 South Broad Street
8th Floor
Philadelphia, PA 19107
(215) 732-2700

Attorneys for Petitioner
Philadelphia Electric Company

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served on this 11th day of June, 1985, by hand, two copies of the Petition of Appellee Philadelphia Electric Company for Rehearing Before the Court In Banc on the below-listed counsel:

John C. Sullivan, Esq.
FRUMKIN & MANTA
1818 Three Penn Center Plaza
Philadelphia, PA 19102

Attorney for Appellant
Hercules Incorporated

Kean K. McDonald, Esq.
LABRUM AND DOAK
700 IVB Building
1700 Market Street
Philadelphia, PA 19103

Attorney for Appellee
Gould, Inc.

A copy of same was mailed, first class, this 11th day of June, 1985, to:

John G. Gleeson, Esq.
HERCULES INCORPORATED
Hercules Plaza
Wilmington, DE 19899

JOSEPH M. DONELY

CERTIFICATE OF SERVICE

I certify that three copies of this Brief of Hercules Incorporated in Opposition to Petition for Writ of Certiorari were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first class postage, prepaid this 18th day of October, 1985, to:

Joseph M. Donley, Esquire
KITTREDGE, KAUFMAN
& DONLEY
800 North American Building
121 South Broad Street
Philadelphia, PA 19107

Kean K. McDonald, Esquire
700 I.V.B. Building
1700 Market Street
Philadelphia, PA 19103

JOHN C. SULLIVAN

Attorney for Respondent
Hercules Incorporated